UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AUSTIN PROFESSIONAL DENTAL CORPORATION, P.C.,
Respondent

and **Case 16–CA–111300**

CHRISTINE FRAZIER -LOMAX
an Individual,

Art A. Laurel, Esq., for the General Counsel.
Mark J. Hanna, Esq. and Jon Michael Smith, Esq.,
for the Respondent.
Jonathan Sandstorm Hill, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in Austin, Texas on March 26–27, 2014. Ms. Christine Frazier-Lomax (Charging Party or Frazier) filed the charge on August 14, 2013,[1] and the General Counsel issued the complaint on December 30, alleging that Respondent Austin Professional Dental Corporation, P.C., (Respondent or Employer) violated Section 8(a)(1) of the National Labor Relations Act[2] (the Act). Respondent filed a timely answer on January 9, 2014, admitting and denying several of the allegations of the complaint.

The General Counsel alleges that after Frazier complained repeatedly to other employees and management about various terms and conditions of employment, she was discharged in violation of 8(a)(1) of the Act. Respondent, on the other hand, claims it merely issued a written warning because Frazier told management that it was illegal to require hygienists to clock out between patients and because she was using the internet for personal use during business hours. The General Counsel further alleges that Respondent maintained an unlawful rule prohibiting discussion of wages, and interrogated and threatened employees about their cooperation with the NLRB in investigating the underlying unfair labor practice charge and testifying at this hearing in violation of Section 8(a)(1) of the Act. I do not find that Frazier was terminated or suspended

[1] All dates are in 2013 unless otherwise indicated.
[2] 29 U.S.C. Secs. 157 and 158(a)(5) and (1).

on May 10 but I do find that the Respondent violated Section 8(a)(1) by maintaining an unlawful rule and by unlawfully interrogating and threatening its employees in September 2013, and March 2014.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses[3], and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs[4] of the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Texas state corporate dental office with 5 separate locations in and about Austin and Dallas, Texas, which provide or have provided dental services to the general public. Respondent admitted in its answer to the complaint and I find that it satisfies the Board's retail and nonretail jurisdictional standards. Thus I find that Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Accordingly, this dispute affects commerce and the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

II. RESPONDENT'S GENERAL BUSINESS ORGANIZATION IN 2013

As stated above, Respondent operated 3 dental locations in Austin, Texas-Family Dentistry of South Austin (South Office), Round Rock (North Office), and Cedar Park, as well as 2 other locations in Dallas, Texas. Respondent's business consists of management—the dentists and office managers—and employees consisting of hygienists, dental assistants, and front office staff. Dental assistants help dentists in procedure with crowns, root canals, and making impressions.

Jennifer Larned (Larned) is the district or general manager, custodian of records, and chief office manager for all 3 of Respondent's Austin dental offices. Larned takes care of anything that pertains to the operations and personnel matters of the dental practice including termination, transfers, suspensions, and other progressive discipline of Respondents employees. (Tr. 139, 284, 517.)

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[3] There are many factual disputes in this case. To the extent necessary, credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and untrustworthy.

[4] The General Counsel and Respondent's counsel filed posthearing briefs. Frazier's counsel did not. Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "R Exh." for Respondent's exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief. Although I have included numerous citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

Valerie Tovar (Tovar) is the assistant office manager of the South Office and has worked at Respondent since April 2011. Tovar reports directly to Larned and handles supervisory duties delegated to her by Larned. Among other things, Tovar has the authority to discipline employees and to recommend the hiring or termination of Respondent's employees. (Tr. 270.) Tovar also had authority to order employees to clock-out if there is a break in their patient schedule during the workday to run errands. (Tr. 272–273.) In 2013, there was 10–12 people working in the South Office including at least one dentist, Larned, and Tovar as management, 2 hygienists, dental assistants, and front office staff. Larned and Tovar issue disciplinary warnings or other actions to employees jointly in the South Office. (Tr. 282–283.)

Rank and file employees also working at the South Office during relevant times to this proceeding, were Christopher Abeita (Abeita), Joshua Eric Martinez (Martinez) and Frazier. Abeita has worked for Respondent as a dental assistant since June 30, 2011. Among his other duties, Abeita was also responsible for ordering Cavitron tips for the South Office.[5] A Cavitron tip is an insert about 2 inches in length with a hook at the end. It is inserted to a pencil-lengthed cylinder instrument used by hygienists to clean patients' teeth or to perform a scaling root cleaning and the tip insert is comprised of a hard steel surface that must be frequently disinfected after every use and occasionally replaced when worn. The tip also has a little opening that allows water to come out.

Martinez worked as a hygienist for over 2.5 years until a week or so before hearing in this case. Frazier, a licensed hygienist for 16 years at the time of trial had been working at Respondent for more than 2 years having started in the North Office on April 1, 2011, and transferred to the South Office at the beginning of April 2013, before her last day of work on May 10, 2013.[6] Martinez and Frazier were the only 2 hygienists working at the South Office in the Spring of 2013.

Abeita keeps track of what supplies are needed and places his monthly orders with Larned. The supplies can include Cavitron tips as used by hygienists to clean teeth, heavy- and light- body impression materials, paper towels, gloves, paper masks and safety goggles.

Among other things, Martinez and Frazier on at least two or more occasions informed Abeita that the Cavitron tips they were using as hygienists were worn down and needed replacement. In response, Abeita alerted both Larned and the Cavitron tips' buyer, Katie at Patterson, that Martinez and Frazier requested replacement Cavitron tips. Abeita told Katie to

[5] Larned denies that Abeita would order Cavitron tips and testified that he does not order them and that he has nothing to do with them other than maybe get them out to give to the dentist to use. Tr. 184–185. As explained below, Abeita was a very convincing witness who had the most to lose by his testimony as a current Respondent employee at the time of hearing and he was not evasive at all during his testimony. While Larned may technically place the tips orders, Abeita certainly has "something to do" with ordering tips as he is Respondent's contact person with Katie, the Cavitron tips manufacturer's representative. Larned, on the other hand, was evasive when answering questions from the General Counsel and there are a number of examples below where I reject Larned's testimony as not credible and this is another instance where the weight of the evidence supports Abeita's version of testimony over Larned's.

[6] Frazier and Abeita knew each other before Abeita joined Respondent as a dental assistant on June 30, 2011, as Frazier was Abeita's instructor at Everest Institute. They were friends while both worked at Respondent and remained friends through the date of hearing.

talk with Larned and Dr. Caparas about getting new Cavitron tips or replacing the ones used by hygienists at Respondent if they were still under warranty. Larned responded by telling Abeita that she would look into it and take care of it. Abeita understood that when he made Larned aware that Cavitron tips were needed, Larned would email Kellie Gurney, who also worked with Dr. Caparas, and they would speak with Katie at Patterson to obtain more Cavitron tips. (Tr. 114.)

Abeita is supervised and reports to Larned and Tovar at the South Office. Tovar initially was assistant manager with Larned as manager and district manager for Respondent. The majority of time Larned either works in her office at the South Office or she does the same work at the North Office.

Hygienists in the South Office use Respondent's scheduling software on the computers at work to determine which patients were slotted to them on any given day of work. In addition to hygienists' schedule, the software also had a treatment schedule or column for dentists and their assistants to follow. The schedules are subject to change on any given day. Hygienists average working with 8 to 12 patients a day for teeth cleaning and x-rays. The schedules of dentists and hygienists are visible on everyone's computer and the schedules are adjusted throughout each day by management. (Tr. 483.) As stated above and while not in writing, Respondent's employees, including, Frazier, Martinez, and Abeita, and others, are required to clock in and out throughout the workday using the computer at Tovar's desk near the entrance of the South Office. They input a personal login code and must clock in and out for lunch or any time. Respondent, usually through Tovar, asks them to clock out such as when there is more than 30–45 minutes time open due to patient cancellations most often at the beginning and end of workdays and in the hour before and hour immediately after lunch.

Respondent's South Office had a high cancellation rate of its patients scheduled for work with hygienists and assistants. Hygienists arrive at work at 7:45 a.m. and the first patient scheduled begins at 8 a.m. According to employees, the Respondent's unwritten policy is that if a patient cancels their appointment leaving a schedule opening of more than 30–45 minutes and there is nothing productive for them to do at work, the hygienists and/or dental assistants are required by Respondent to clock-out, be on standby or on-call, run errands, and not get paid until later in the day when their next patient arrives, if there are more patients scheduled that day.

Respondent's management says the policy is the same except that the patient gap must be somewhere between 1–1.5 hours and there must not be anything else productive before an employee is ordered to clock-out. (Tr. 272–280, 328.) Employees are expected to go home early if their last patient(s) for the day cancel and there are no more patients to fill in a canceled slot. Therefore, on any given day, Respondents employees did not know what their schedule was and they might be required to travel 40 or more minutes through traffic into the South Office only to find that a patient had canceled their appointment and the employee was not being paid for traveling into the office until a new patient arrived, if any. If this occurred later in the day, employees were sent home early due to patient cancellations. (Tr. 486–487.)

Generally none of the employees liked this uncertain scheduling and both Martinez and Frazier voiced their opinions and complained to Larned and Tovar when Frazier was at the North Office, when Martinez, Frazier and Abeita would go to lunch in April and early May while working at the South Office, and during the April 3 lunch meeting discussed below. (Tr. 330–

331.) Respondent's hygienists expected to work and get paid from 8 a.m. to 5 p.m. and they also believed that if there are patient cancellations, an employee should be entitled to do other work-related productive tasks such as sterilizing or sharpening instruments, cleaning, or patient contact calls rather than being required to clock-out and be on standby.

III. RESPONDENT'S POLICY REGARDING DISCUSSION ABOUT WAGES

Amended complaint paragraphs 6(d) and 7 allege that since about September 2013, Respondent has maintained the following rule. "Salaries and wages are a private matter. Conversations between employees regarding this are discouraged in order to prevent unnecessary disputes. Cause for termination will arise if any employee discusses salaries or wages with anyone other than their manager." The General Counsel alleges that this rule is unlawful and violates Section 8(a)(1) of the Act.[7] Respondent does not dispute that it maintains this rule.

Employees are given Respondent's office policies and procedures manual when they are first hired to work at Respondent and they are asked to sign a receipt for the manual. (Tr. 95–97; GC Exh. 12.) The manual contains information including what the Respondent expects from its employees. Employees are provided copies of the manual and can ask Respondent's office managers, Larned or Tovar, if employees question the manual or want copies of parts of it printed out at work.

One specific rule or policy at Respondent since about September 2013, provides the following rule: "Salaries and wages are a **private** matter. Conversations between employees regarding this are discouraged in order to prevent unnecessary disputes. Cause for termination will arise if any employee discusses salaries or wages with anyone other than their manager." (Tr. 86–87, 496–497; GC Exh. 12 at p. 5.)(Emphasis in original.)

Wage discussions among employees are considered to be the core of Section 7 rights. *Alternative Energy Applications,* 361 NLRB No. 139 (2014); *Parexel Int'l, LLC*, 356 NLRB No. 82, slip op. at 3 (2011). An employer's rule which prohibits employees from discussing their compensation is unlawful on its face. *Waco, Inc*., 273 NLRB 746, 747–748 (1984); *DaNite Sign Co*., 356 NLRB No. 124, slip op. at 1 fn. 1 and slip op. at 7 (2011), quoting *Freund Baking Co*., 336 NLRB 847 (2001); *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). Moreover, Respondent admits to this Act violation. R. Br. at 15.

Based on the foregoing, I find that the Respondent has violated Section 8(a)(1) of the Act by promulgating and maintaining a policy that explicitly prohibits employees from discussing their compensation.

[7] The amended complaint does not allege that any employee at Respondent was disciplined for violating this unlawful rule. See i.e., *Continental Group, Inc*., 357 NLRB No. 39, slip op. at 4 (2011).

IV. FRAZIER'S 3/31/13 TRANSFER TO RESPONDENT'S SOUTH OFFICE LOCATION

After receiving a verbal warning, a written warning, a second written warning[8] while working at the North Office, on or about March 31, Frazier was transferred by Larned from Respondent's North Office to its South Office to continue working as a hygienist.[9]

Occasionally, Respondent's employees would share lunch together either out of the South Office or in its break room. Abeita, Martinez, and Frazier would eat together once Frazier arrived at the South Office. As stated above, occasionally these 3 employees would complain at lunch about Respondent's frequent lack of working Cavitron Tips and the clocking-in and clocking-out policy at Respondent. Larned and Tovar were aware that these 3 employees were socializing over lunch since Frazier came to the South Office and these office managers believed that Frazier was negatively affecting the work morale of Martinez, Abeita and others.

Also within the first couple of weeks at the South Office, Frazier observed Larned telling Abeita and others to clock-out and go home early. Larned also told Frazier to clock-out early and run errands or clock-out and stay at work until another patient arrived. (Tr. 400–401.) Frazier continued to disagree with Respondent's clocking in-clocking out policy as she viewed herself as an hourly employee entitled to work a set amount of hours and not free to clock-out and run errands. Id.

V. THE APRIL 3, 2013 LUNCH MEETING BETWEEN RESPONDENT'S STAFF AND MANAGEMENT

From late 2012, though early April 2013, Martinez complained to Larned on multiple occasions that the Cavitron tips were nonfunctional and needed replacement due to their high volume use with patients. (Tr. 31–32, 177.) By April, there were approximately 5 Cavitron tips in the South Office and only 2 or 3 were functional. (Tr. 36.) Martinez even recalled conversations with the Cavitron tips' buyer, Katie at Patterson, more than once where Katie took a look at the Cavitron tips and opined to Larned that "these have been done for a long time" and need to be replaced. (Tr. 36–37.)

On April 3, a mandatory lunch meeting was called by Respondent's managers, Larned and Tovar. (Tr. 286.) Larned provided lunch for the employees attending the meeting. Attending the meeting were employees, Frazier, Martinez, Abeita, Deanna Alvarado (Alvarado), and Ashley Stokes (Stokes), with members of Respondent's management, Larned and Tovar. (Tr. 33.) Tovar demanded that the employees clock-out for the mandatory meeting.

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[8] Respondent's progressive disciplinary policy begins with a verbal warning, two written warnings, and may be followed by a last written warning, a suspension, a final warning and/or a termination.

[9] Frazier was not credible when she denied responsibility for her own actions leading to disciplinary warnings on a number of occasions in 2011-2013. Also in a number of instances, Frazier exaggerated facts and changed her testimony on cross-examination or re-direct. Frazier did not produce a recorded conversation of key events from May 10 despite her saying she recorded the same. Also, I further find that Larned and Frazier had personality conflicts with each other that led to Larned disciplining Frazier before her transfer to the South Office and later shouting matches on April 3 and May 10. Larned was credible when she took credit for saving Frazier's job and transferring Frazier to the South Office in late March 2013 after incidents involving two other dentists Frazier did not get along with and a fellow employee who she directed a derogatory term toward.

(Tr. 32–33, 129.) Frazier and Martinez responded by opining that they should not be required to clock-out to attend a mandatory office meeting. (Tr. 380.) Stokes responded to this by saying that because Larned was providing lunch to Respondents' employees, they should clock-out. Id.

The meeting was a typical monthly lunch meeting called by Larned where she went over areas employees needed improvement and discussed the current state of the office. The meeting lasted approximately 15–30 minutes and Larned did most of the talking at the office lunch meeting.[10] She spoke about what Respondent and the dentists expected from the staff regarding professional work conduct, the clocking in and clocking out policy at Respondent, not using vulgarities or speaking badly of others during worktime, and being productive when in the office. Larned also instructed employees not to steal time from the Respondent or ride the clock meaning that employees should clock-in soon after their 7:45 a.m. arrival unless they had patient cancellations, clock-out for lunch, clock-in after lunch, and clock-out promptly after their last patient of the day. Martinez heard Larned mention what changes she believed were needed to be more efficient throughout the office. Larned also asked the staff if there were any issues they wanted to raise at the meeting with regard to improving things at Respondent. At first no one volunteered to add anything to what Larned was talking about.

At the end of the meeting, however, Martinez and Frazier both raised the need for new Cavitron tips again with Martinez asking Larned first "What about the Cavitron tips we've been asking you for?" (Tr. 72, 112, 129, 168, 285–286, 288.) Martinez believed that as a hygienist, new functioning Cavitron tips were necessary to run an efficient dental office so to improve the quality of dental work provided to Respondent's patients.

Abeita and Larned testified that Martinez first raised the issue of needing Cavitron tips when Larned asked if anyone had any questions at the April 3 lunch meeting. Martinez did not recall this and Frazier at first testified that she was the only employee who spoke up at the meeting but later said that Martinez mentioned at the meeting that the office did need Cavitron tips after Larned asked if anyone had questions.

Because Abeita and Larned both testified that Martinez spoke first when complaining about the need for more Cavitron tips and Frazier denies this, a credibility resolution is warranted. I credit Abeita, who was a strong witness, with a solid recollection and demeanor. I further credit the testimony of Abeita, as it is consistent with the testimony of Larned on this point, over the initial testimony of Frazier.

[10] Larned and Tovar described attendance at the April 3 mandatory lunch meeting as somewhat haphazard in nature with employees floating in or trickling in and out of the meeting at their leisure which I reject as untrue as none of the nonmanagement employees described it this way. In addition, I further find that Tovar testified in a vague and evasive manner and was not credible when she said that employees who attended the April 3 lunch meeting were not required to clock-out for the meeting where lunch was served and she was not credible that there was no discussion about clocking in and out at the meeting. Tovar also was not believable when she testified that Larned did not get as loud as Frazier at the April 3 lunch meeting as this contradicts the weight of the evidence from Martinez, Frazier, and Abeita. Also Tovar was the only witness to testify that Larned was in tears from crying due to her encounter with Frazier at the April 3 lunch meet which I further find non-credible. Tovar on numerous occasions had only slight recollection of many events during relevant times in 2012 and 2013 which was not credible.

Frazier then added: "Jen [Larned], are you aware that we only have 5 Cavitron tips and 3 of them are broken, so me and Josh [Martinez] [sic.] are sharing 2 Cavitron tips?" . . . "we've asked for those [Cavitron tips] quite a few times and we haven't gotten them yet." (Tr. 111–112, 376, 449.) Martinez believed that Frazier was speaking up to Larned for him and all other employees who did not have the courage to speak up to Larned and that Frazier was questioning Larned's authority to improve working conditions for the benefit of patients. (Tr. 35–36, 71–72.) He further recalled Frazier voicing her opinion to Larned on behalf of the other employees that Cavitron Tips were needed.

Larned responded to the questions by shifting the conversation to Martinez and asking him where the 10 Cavitron tips were that she had ordered in the past. (Tr. 168, 376.) Martinez responded to Larned reminding her that she had recently hired a temporary hygienist for a month and reasoned that maybe the temp broke them because that is the time they started disappearing. (Tr. 168, 179, 376.) Larned then replied that she would go to the North Office for more Cavitron tips. (Tr. 377.)

Frazier responded adding: "Jen [Larned], I don't want you to go to the North office and get that broken stuff and bring it down here." (Tr. 377.) Next, Larned concluded the meeting, got agitated and upset, and said to Frazier: "How dare you come here and embarrass me . . . you have only been here for 3 days and you are starting trouble already." (Tr. 180–181, 377, 449.) Larned then stood up and said as she was walking out of the meeting in a raised voice that: "This is not the only office I manage and my plate is pretty full between the 2 offices I take care of and I am aware that the Cavitron tips are needed and I will try to get them in time." (Tr. 112–113, 449, 452.)

While I find that both Frazier and Larned raised their voices and began arguing about the request for Cavitron tips, Larned was the first to raise her voice and Abeita convincingly observed that Larned was the only meeting attendee who got heated or visibly agitated in response to the renewed request for new Cavitron tips. (Tr. 35–36, 129.)

Martinez also observed Assistant Manager Tovar actually rolling her eyes when the meeting ended and heard her comment that she did not like Frazier because she was always being outspoken and Tovar further stated that she wished Gina, Frazier's predecessor as hygienist, was back working at Respondent in place of Frazier. (Tr. 48.)

Larned claimed that the Cavitron tips had already been ordered when the April 3 lunch meeting took place. (Tr. 168.) None of the other witnesses or documentary evidence, however, confirm this so I reject this testimony.

Others besides Larned left the lunch meeting but Martinez, Frazier, Abeita and Deanna stayed behind and Martinez asked why Larned was getting so upset as they were just asking for the Cavitron tips.[11]

[11] Frazier also testified that she did not raise her voice at the April 3 meeting and that after the meeting concluded and management left, she "high-fived" with Abeita and did a "fist bump" with Martinez to signify their agreement with Frazier stating at the meeting that the hygienists need Cavitron tips. (Tr. 379.) I reject this line of testimony as being unsubstantiated by other witnesses and self-serving to Frazier.

As the meeting ended, Martinez saw Von Seht, the South Office resident dentist, walking toward the employee lounge and as Larned left the meeting she made a gesture to Von Seht putting her index finger and pulling it across her throat saying to him: "I'm done with Christine [Frazier], I'm done with her." (Tr. 37–38.) Larned did not recall making such a gesture though she admitted that she usually used this type of gesture to tell somebody to stop doing something or to have them turn something off like a vacuum cleaner. (Tr. 175–177, 258.)

Because Martinez and Frazier stated that Supervisor Larned made the finger gesture across her throat to Von Seht saying that she was through with Frazier, and Larned denied or did not recall this exchange, a credibility resolution is necessary. I credit Martinez and Frazier, who both had a candid and straightforward demeanor over Larned, a less reliable witness, whose testimony seemed rehearsed. I further credit Martinez and Frazier over Larned as one would expect that, if true, Von Seht would have corroborated this point for Respondent by his own testimony but he did not. Lastly, Larned's demeanor was less than believable; specifically on this point, while adept at cooperatively replying on cross, she sparred and frequently paused on direct as a section 611 witness.

Respondent's personnel files contain a 4/3/13 Disciplinary Warning for Insubordination to Frazier representing a Second Written Warning to her this time for:

> "Christine [Frazier] openly and aggressively argued with me [Larned] in front of all staff about Cavetron [siq] tips. Christine has been at this location for three days and this will not be tolerated. There is a way to have a discussion and a way that is [siq.] [it] becomes offensive not only to myself [Larned] but to the entire staff."

GC Exh. 10. The document also references that Tovar witnessed the meeting where Larned presented this discipline to Frazier with the next progressive discipline for Frazier being a Last Written Warning and that Frazier refused to sign the document. Id.

Frazier denied ever seeing this disciplinary warning before the hearing. (Tr. 382–383.) Similarly, Tovar did not talk to Larned about disciplining Frazier due to her conduct at the April 3 lunch meeting and Tovar also did not recall Frazier being disciplined by Respondent at hearing for her April 3 lunch meeting conduct. (Tr. 292–293.) When Tovar first saw the disciplinary write-up of Frazier, GC Exh. 10, she did not recall seeing it before. Id. Only after she saw her signature at the bottom of the 4/3/13 Disciplinary Warning did she recognize the signature as hers but still did not remember the discipline being issued. (Tr. 293.)

Larned testified that she met with Frazier one or 2 days after the April 3 lunch meeting to present her the 4/3/13 Disciplinary Warning referenced above (GC Exh. 10) but Larned did not recall exactly when the meeting occurred and Larned also did not exactly remember how Frazier responded to the discipline. (Tr. 172–173.) Given Larned's testimony along with Tovar recognizing her signature on the document, I find that the weight of the evidence shows that Respondent issued the 4/3/13 Disciplinary Warning to Frazier soon after the April 3 lunch meeting as Frazier was not credible when she testified that she never saw the warning before.

On May 2, Frazier approached Larned about using leave for half a day to attend a doctor's appointment for a medical issue that had arisen in connection with a positive

mammogram and Frazier's need for a resulting ultrasound test. Larned responded to Frazier by saying: "I'm not giving you any time off. You embarrassed me." (Tr. 381–382, 452–458; R. Exh. 6.)

VI. LARNED'S WARNINGS LEADING UP TO MAY 10 SHOWDOWN WITH FRAZIER

From April 3, through May 10, Abeita, Martinez, and Frazier continued to go to lunch together and Larned observed them leave the South Office for lunch. (Tr. 383–384.). Sometime in early May 2013, Larned pulled Abeita to the side in her office and advised him that his attitude had gone a little to the wayside meaning that Larned thought that his attitude towards other coworkers and work in general had been lacking and that Larned did not like his attitude and she told him she knew that his attitude could improve. Moreover, Larned warned that Abeita would go down with Frazier. (Tr. 126, 183–186.)

Larned denies saying that Abeita would go down with Frazier. As before, I reject Larned's denial of this statement and credit Abeita's version of facts from his attitude meeting over Larned's because he was a much more trustworthy witness than Larned, his demeanor was persuasive and convincing showing nervousness one would expect from testifying at hearing possibly saying things that could adversely affect his employment yet he did not hesitate, look at a lawyer for answers, or be evasive as Larned had from time-to-time at hearing.

Tovar also complained that once Frazier arrived at the South Office, Abeita, and Martinez, who would usually lunch with Tovar and the other front desk staff, stopped inviting Tovar and the staff to lunch and Tovar and Respondent's employees were no longer a "big family" in her mind until Frazier stopped working at Respondent and things returned to the "big family" way it was before Frazier arrived at the South Office. (Tr. 342–343.) Tovar also opined that Abeita's work attitude changed when Frazier arrived at the South Office and he stopped being "goofy" with the staff and patients at work but that he returned to being "a big goofy person" after Frazier stopped working at Respondent. Id.

Martinez also spoke with conviction of a similar conversation he had with Larned just prior to going to lunch with Frazier in early May. Larned told Martinez: "I don't like her [Frazier] – you guys socializing, she's changing your alls' attitude and she's [Frazier's] a cancer." (Tr. 31.)

By May 10, Frazier and other employees had been requested on multiple occasions by Respondent to clock-out when they had an open block between patients. (Tr. 442–443.)

At the end of the workday on Thursday, May 9, Frazier checked her schedule for the following Friday and found it fully scheduled for the times 8 a.m. – noon and that she was scheduled to work a half-day Friday. (Tr. 458–459.)

VII. MAY 10 SHOWDOWN BETWEEN LARNED AND FRAZIER

A. Facts

Also in the morning of May 10, Von Seht testified that he walked by Frazier's operatory and noticed that she did not have a patient and that she was sitting at her computer with her cellphone on her desk. (Tr. 509–510.) Von Seht wondered what Frazier was doing and looked

into her schedule on his computer and noticed that she did not have her next patient for 2 hours. (Tr. 510.) Von Seht says that one of his job duties is to police employees and make sure they are working so he notified Tovar to see if she could find something for Frazier to do or force her to clock-out and come back later. Id.

Tovar went into Frazier's operatory and told her to clock-out but Frazier refused to do so. (Tr. 511.) Tovar then reported this back to Von Seht. Id. Von Seht then asked Larned to take care of things with Frazier and he says he knew what to expect next. (Tr. 511.) Von Seht said he avoids confrontation and preferred that Larned diffuse the situation and address Frazier's refusal to clock-out when demanded by Tovar. Id. Von Seht does this so that personnel conflict does not make his hands shake which would have a negative effect on his dental practice. (Tr. 511–512, 516–517.)

A second version of these same events was told by Tovar who testified that someone had brought in breakfast tacos to work the morning of May 10, and that by 9 a.m., Von Seht had noticed that Frazier had 2 or 3 cancellations to her schedule leaving her a gap of 1–1.5 hours until her 11 a.m. appointment. (Tr. 293–294.) Von Seht asked Tovar to ask Frazier if she could clock out to go run some errands. Id.

Tovar went to the back break room where Frazier was eating a breakfast taco. Tovar approaches Frazier and says: "Dr. V[on Seht] wanted me to see if you could possibly clock out and go run some errands since there is a big gap on your schedule."[12] (Tr. 294, 326–327, 331–332.) Tovar said that Frazier replied: "I don't clock out." Id. Tovar proceeded to report this to Von Seht who told Tovar that he would take it from there and Tovar returned to her front desk. (Tr. 295, 327, 332.) Soon thereafter, Larned arrived at work and Tovar informed her as to what had happened that morning between Tovar, Von Seht, and Frazier. (Tr. 188–189, 296.)

Frazier's version of the same events that morning of May 10, involved Von Seht asking Tovar to address Frazier when Frazier's 9 am appointment canceled and she experienced a 22-minute gap in her schedule before her next appointment at 10 a.m. as Frazier's 8 o'clock patient arrived late at 8:20 a.m. and her treatment spilled over past 9 a.m. to approximately 9:20 a.m. Tovar approached Frazier and told her that she needed to get off the clock. (Tr. 388–461–462.) Tovar did not offer to find some other office jobs for Frazier to do in the interim. At the time, Frazier was on her way to the sterilization station or on her way out of it when Tovar approached her in the hallway. Tovar asked Frazier to clock-out due to the 22-minute gap in her schedule and Frazier responded and said:

> "What are you talking about get off the clock?" Tovar answered: "You had a cancellation at 9:00." And Frazier responded: "Yeah, but the first patient came late, so I just finished. And I'm sterilizing -- I'm sterilizing instruments. I still have to clean my room. I need to make notes and set up for the next patient." Tovar responded to this by saying: "I don't care. Get off the clock." Frazier responded: "I'm working. And, by the way, I think that's illegal. You know, the Department of Labor has this rule and it states that what I do is called Engaged to Wait or Waiting to Be Engaged. I have it on my

[12] On cross-examination by Respondent's lawyer's leading question, Tovar changed her testimony and added that she gave Frazier the option of "doing other work" that morning rather than simply asking Frazier to clock-out and run errands. Tr. 329–330. I find this new changed testimony to be fabricated and noncredible and the inappropriate result of a leading question.

> computer. I can show you." Tovar responded: "I don't know that and I don't want to see it. You need to clock out."

(Tr. 391–393; GC Exh. 13.) Tovar appeared irritated and annoyed by Frazier's refusal to clock-out and spoke in a rude tone of voice in response to Frazier. Tovar told Frazier that she would report Frazier's refusal to clock-out to Larned. (Tr. 391–394, 461–463.)

Sometime around 10 a.m., Larned approached Frazier in the hall after hearing from Tovar that Frazier had been disrespectful to Tovar and had refused to clock-out and been idle eating and surfing the internet for 30 minutes. (Tr. 189–191.) Larned instructed Frazier that whenever she is asked to do something by a supervisor, either Von Seht or Tovar, Frazier needed to make sure it got done. (Tr. 189.) Frazier responded to Larned by telling her that it was illegal to ask employees to clock-out and took her to her operatory to show her on her computer the Department of Labor Worksheet #22. (Tr. 191; GC Exh. 13.) Larned and Frazier also discussed Respondent's internet policy that prevents employees from using the internet while working on the clock. (Tr. 191.) Larned also told Frazier that she was getting her a patient and that she was not going to look on Frazier's computer. Id. Larned then returned to her office and looked up Worksheet #22 on her own to determine the legality of forced clock-outs. (Tr. 191–194; GC Exh. 13.) Larned sent a patient to Frazier later that morning. (Tr. 200.) Because Larned sent over a patient to keep Frazier busy around 10 am on May 10, I find that Von Seht's and Tovar's version of Frazier time gap being 1.5–2 hours due to canceled appointments at 9 and 10 am is more credible than Frazier saying her time gap was only 22 minutes that morning.

Later that same morning on May 10, Martinez was in his operatory when he overheard an argument between Larned and Frazier outside Frazier's operatory before Larned started arguing with Martinez too. Larned was trying to tell Frazier things of some sorts such as: "If you don't like it [here], there's always the door, you could always leave if you don't like how things are run here." (Tr. 41–42.) Martinez opined that on multiple occasions dating back before April 2013, Larned would make this same response when he and Frazier complained about the inefficient scheduling policy, the mandatory clocking-out policy, or other things about their work conditions. (Tr. 82.)

Martinez, like Frazier, was also scheduled to work from 8 a.m. to noon on May 10. As it turns out, Martinez had a gap in his schedule at Respondent due to his 10 a.m. patient Derrick Choppa's cancellation and, as a result, Martinez expected to clock out early that day at 10:30 based on Respondent's requirement that employees clock out when they have gaps of 30–45 minutes or more and Choppa was not there by 10:30.

Instead of clocking out and leaving earlier than scheduled, Martinez learned that Respondent management substituted patient Jessica Burke into the same 10:30 a.m. slot as Choppa for treatment and Martinez then believed he would be done for the day after treating the substituted Burke. As Martinez attempts to clock out after he finishes with Burke at 11:30, Larned pulls him back to treat patient Leo Kaplan from 11:30 am to 1 p.m.

Martinez became upset about the sudden add-on of Kaplan to his schedule at 11:30 a.m. when the day before his schedule showed he had no patients after 11 a.m. The inconsistent and unreliable scheduling upset Martinez because schedules at Respondent are almost always inconsistent and he questioned Larned and complained of the inconsistent scheduling work.

Larned, in response, became upset with Martinez and said that if he did not like it, he could always walk out the door and look for another job somewhere else. (Tr. 56–69, 80.)

Frazier recalled the afternoon events of May 10 beginning with her finishing treatment of her last patient at approximately 1 p.m. She cleaned her operatory and proceeded toward checking her Monday appointment schedule and clocking out when Larned approached her to come into her office before clocking out. Frazier says she pressed voice record on her cellphone so she could record the conversation with Larned because Frazier was "tired of the way she [Larned] talks to me [Frazier], cursing, unprofessional, and then I [Frazier] never have any proof, so I [Frazier] was going to make sure this one [conversation] gets to [Respondent's] corporate office." [13](Tr. 403–404.)

The 15-minute meeting took place in Larned's office behind closed doors with Larned seated behind her desk, Frazier seated across from her by the window and Tovar standing next to Larned's desk near the door. Larned next asks Frazier why she is on her cellphone while still on the clock? Frazier responds saying she is checking her emails. Tovar soon joins the meeting and it is the three of them—Larned, Frazier, and Tovar. Tovar observes Frazier texting someone while Larned is discussing why they were meeting in her office.

Larned began the meeting referencing Tovar's report that Frazier had refused to clock-out earlier that day when instructed to do so by Tovar. Larned went on to repeat that if Von Seht, Tovar, or she ask Frazier to clock-out, she should do so without discussion or nasty or negative attitude and further says that Frazier is not a team player, she is a poison and cancer at the office and further told Frazier that Frazier's behavior is affecting the rest of the staff at the South Office and bringing the morale of the team down. (Tr. 186–187, 333, 404–405, 410.) Tovar confirmed that Larned called Frazier "a poison" but could not remember if she also called Frazier a cancer. (Tr. 303–304.)

Next at the meeting, Larned then says that she is writing Frazier up and presents Frazier a written disciplinary warning notice dated May 10, 2013, for "Insubordinations and over all attitude." (GC Exh. 17.) Larned also tells Frazier that she wants Frazier to take the write-up and "sign it right now." (Tr. 410.) The document explains:

> "When Dr. V or Valerie [Tovar] ask you [Frazier] to do something, it is not up for discussion. You [Frazier] stated that it is illegal for us to ask you to get off the clock, it is not illegal for us to ask you to get off the clock during down time. It is in the hb [handbook] re internet use during business hours, [siq.] It is not appropriate to use the internet for personal use during business hours. Your attitude toward your coworkers is [siq.]"

GC Exh. 17. The document is unsigned and is also marked as a second written warning in Respondent's progressive discipline program with the proposed future action being termination. There is no discussion portion written in nor is there a section dated 5/13/15 on the document presented to Frazier as confirmed by Tovar. (Tr. 298–299, 306; compare GC Exh. 17 with GC Exh. 11.)

[13] Frazier did not offer any cellphone recording at hearing claiming she forgot to email a copy to herself and that her cellphone broke down at some point approximately a month later in June 2013, and she lost the recording along with her contacts, photos, etc. Tr. 420, 479. I find it unbelievable that such a key piece of evidence would be lost or destroyed if it actually existed. As result, I do not find it credible that Frazier actually recorded the May 10 conversation between Larned and Frazier with her cellphone.

Frazier refused to sign the May 10 disciplinary warning referenced above because it was incomplete and contained a fragmented sentence. In addition, Frazier refused to sign it because she believed it was inaccurate as she was not surfing on the internet. Frazier also explained that Larned believed that the Respondent's handbook provided that an employee was suppose to clock-out when directed by a supervisor and had no patient within 30–45 minutes away. Frazier responded that it is illegal for Respondent to force her to clock-out at times and that the Department of Labor has a regulation that says an employee is not required to clock-out and remains getting paid on the clock if the employee is engaged to wait or waiting to engage at work. (Tr. 209, 410–412; GC Exh. 13.) Larned had the worksheet on her computer screen in her office and responded by trying to explain to Frazier the difference between "engaged to wait" and "waiting to be engaged." (Tr. 201; GC Exh. 13.)

Next, Larned responds to Frazier by saying that Larned was not going to accept any of Frazier's 3-page rebuttals to the discipline. At that point, Frazier tells Larned that she is going to take the unsigned and incomplete disciplinary warning with her and that she is not obligated to sign it at that very moment. (Tr. 412.) She concludes by telling Larned in front of Tovar that she was going to consult with an attorney and started to walk toward the door in Larned's office. (Tr. 300, 412.)

When Frazier attempted to open the door to leave the office with the document, Tovar briefly blocked Frazier's attempt to leave. Frazier next grabbed the knob and said to Tovar: "Excuse me" and proceeded to leave the office with Larned standing in the hallway and Frazier repeated that she was taking the unsigned disciplinary warning with her and was going to consult a lawyer and "see what they think about clocking in and out." (Tr. 300, 412.)

Larned responded to this by calling Frazier an "idiot" and then backtracked when Frazier asked her if she really did call her an idiot and Larned changed her response to: "It's idiotic" and the two argued back and forth several times whether Larned had used the term idiot or idiotic addressed to Frazier taking the disciplinary warning to a lawyer to consult about Respondent's clocking in and out policy. (Tr. 204, 412–413.) Larned and Tovar confirmed that Larned referred to Frazier's attitude as "idiotic" but Tovar had no memory of Larned calling Frazier an "idiot" or that her behavior was "idiotic." (Tr. 304.)

Frazier continues to walk to the front desk to clock-out and tells Larned that she is leaving. Larned responds as the two women are walking together toward the front desk by screaming to Frazier that she is sick of her, "sick of this" and that "you're fired."[14] (Tr. 413.) Larned denied telling Frazier that she was fired or terminated. (Tr. 209–210, 230.) Larned directed her response to Frazier in the presence of only Tovar as the 3 women walked in the South Office hallway to the front desk. Id. Frazier thinks that others at the front desk must have heard Larned screaming at this time despite the fact that the 3 were not in sight of the front desk at the time as Von Seht's office door was open and the front desk was just steps away. (Tr. 414, 473–475.)

When Larned and Frazier reached the front desk area, Larned was telling Frazier to "get out of here, you get out." (Tr. 415.) Larned admits that she told Frazier to leave that afternoon but did not remember that she told Frazier also to "get out." (Tr. 207.) Larned said that at the

[14] Later on cross-examination, Frazier changes her testimony and says that Larned screamed "You're fired" four or five times between her office and the end of the hallway. Tr. 473. I also find this newer testimony noncredible and unsupported by any other evidence.

time she intended to make sure that Frazier left the office because "she was bubbling over." Id. Frazier responded:

> "you know, I'm just not going to deal with this anymore, your insults. I'm not going to argue with you. You call me an idiot, I'm not an idiot. You're [Larned is] unprofessional, I'm not going to argue with you and I said to [LaTonya sitting at the front desk near the clock out computer] will you excuse me so I can clock out?"

(Tr. 415.)

Frazier proceeded to clock-out and at that time Larned appeared to calm down and asked Frazier if she could have the disciplinary warning document back from Frazier and that she wanted to make a copy of it. Frazier responded: "Oh, you didn't make a copy ? Too bad," (Tr. 415, 204.) In response, Larned tried to snatch the paper from Frazier. (Tr. 415–416.)

At about the same time in early afternoon on May 10, Abeita overheard portions of the argument between Frazier and Larned while he was working in the South Office with Frazier on her last day of work at Respondent. In the operatory approximately 15–20 feet away, he overheard, but could not actually see, Frazier and Larned arguing over a piece of paper of some sorts. According to Abeita, Larned was asking Frazier to return the piece of paper to her and the two women were speaking loudly and fighting over who should retain the paper. Abeita heard them at the loudest parts of their disagreement with Larned saying to Frazier: "Give me the paper;" "Stop talking to me that way;" and "If you are going to continue this way, get out or I'll suspend you." (Tr. 120–121, 203–204, 476.) This statement once or twice was the last thing that Abeita heard between the 2 women on May 10, 2013. Tovar also testified to both Larned and Frazier elevating their voices and similar utterances attributed to Larned telling Frazier that if she continued with her disrespectful attitude and did not leave the office, Larned would suspend her.[15] (Tr. 303, 305.)

Stokes, working at the front desk, testified that she heard when Frazier and Larned came around the corner to her front desk in the early afternoon of May 10, and heard Larned warn Frazier that if she did not calm down that she would have to suspend her. (Tr. 502.) Stokes further testified that Larned was asking Frazier to wait to talk to her and Frazier was clocking out and waved her finger at Larned and walked around her to leave the office. (Id.)

Stokes also testified that she was not given any indication that Frazier would not return to work on Monday, May 13th, and that Stokes was aware that Frazier had patients scheduled to treat on the following Monday morning, May 13, and that she did not become aware that Frazier did not show up for work until she arrived at the office at 9 a.m. on Monday, the 13th. (Tr. 503, 505.)

Von Seht gave conflicting testimony about what he heard and observed the afternoon of May 10, when he overheard Larned and Frazier arguing outside his open office door. (Tr. 511–512, 515.) Von Seht describes both Larned and Frazier as having a "pretty heated exchange" and raising their voices in argument as he listened. He heard Larned telling Frazier that she was insubordinate and Frazier responding that Larned should quit calling her that. Von Seht said the argument went back and forth and then Frazier just walked out. Id. Tovar described Von Seht as

[15] Later on cross-examination by Respondent's lawyer, Tovar could no longer remember anything said between the 2 arguing women though somehow she was certain that Larned did not say to Frazier that she was fired or terminated. Tr. 334–335. This changed testimony is not credible.

having a "really funny" . . . "blank stare" look on his face, appearing confused as to what was going on when the group of 3 walked past his office. (Tr. 334.)

Von Seht denied hearing Larned telling Frazier that she is terminated but immediately after Frazier left the office on May 10, Von Seht was concerned whether Frazier would return to work on Monday, May 13, and asked Larned:

> "[I]s she [Frazier] going to come back on Monday? You know because – you know, it's also my [Von Seht's] job to make sure that … I don't want to have patients who are unhappy…. So they come in expecting a -- you know, their teeth to be cleaned and if there's no one [Frazier, as hygienist,] there to do it [x-ray and clean teeth], you know, a lot of times they'll complain to me [Von Seht]. You know, they'll – I'll hear it."

(Tr. 212, 511–512, 515.) Von Seht further explained that he has kind of a sixth sense about when people might not show up for work based on Von Seht having worked with enough people to know when a no-show employee is expected. Id.

According to Von Seht, Larned responded: "[O]h yea, she'll [Frazier will] come back" and Larned tried to assure Von Seht that Frazier would be back in the office on Monday, May 13. (Tr. 512.) Larned claims she responded by telling Von Seht that Frazier will be back on Monday because she needs this job due to her having 2 young children and Larned also told him that she did not fire Frazier. (Tr. 212.)

Who said what to whom the afternoon of May 10, remains unclear to me particularly given the large number of noncredible statements attributed to Larned, Tovar, Frazier, and Von Seht leading up to May 10. Frazier is the only witness who allegedly heard Larned tell her she was fired. Frazier attempts to use her unemployment benefits claim and text messages from May 10, as further proof that she was terminated when they are simply self-serving and unsupported by any independent evidence. Larned, Tovar, Abeita, and Stokes did not hesitate when recalling that Larned told Frazier that if she did not calm down and get out, she would suspend Frazier for her conduct on May 10.

In sum, I find that Larned and others heard Larned tell Frazier that if she did not leave the office on May 10, (when Frazier was fully prepared to clock-out and leave as her day had ended on its own with no more patients to see as she expected per the schedule) due to the argument that had accelerated to louder talk between Larned and Frazier, Larned told Frazier she would consider suspending Frazier. At no time did Larned say that Frazier was fired or terminated or suspended. Because Frazier promptly left after Larned mentioned potential suspension if Frazier stayed and continued the fight before patients and other staff at the office, Frazier could not reasonably believe that she was suspended or fired on May 10. The General Counsel contends Frazier's testimony was inherently credible, while Larned, Abeita, Tovar and Stokes' testimonies were inherently less probable. As stated in other parts of this decision, I credit Abeita, who was actually present on May 10, and testified consistently with other Respondent employees and management, had a candid and straightforward demeanor over Frazier, a less reliable witness, whose testimony seemed much less believable. Thus I find that Frazier was not terminated or suspended on May 10.

After leaving the South Office on May 10, Frazier texted one person and then called the Texas Workforce Commission at 1:06 p.m. to ask if it was legal for an employer to ask employees to clock-in and clock-out. (Tr. 416–417, 478; GC Exh. 18; R. Exh. 7 at p. 1.) At the same time while on the telephone and questioning Frazier about her situation, Frazier filed a

claim with the commission for unemployment benefits based on her firing on May 10, almost directly after leaving the South Office that day.[16] (Tr. 416.) Sometime after May 10, Frazier spoke to someone at the Workforce Commission and they read to Frazier a statement they took as to what Larned had told them about events on May 10, and Frazier was allowed to respond to Larned's statement denying most of her statements. (Tr. 483; R. Exh. 7 at p. 4.)

Approximately an hour after Frazier left the South Office on May 10, at 2 p.m., she texted Martinez who had worked earlier that day but had already left the office. Martinez immediately called Frazier and the two spoke for about an hour over the telephone. Frazier told Martinez that Larned had fired her. Martinez opined that Frazier sounded sad when she recounted to him being terminated by Larned earlier in the afternoon. (Tr. 73.) She also told him about the meeting between the two in Larned's office where Larned was trying to write-up Frazier and Frazier told Martinez that she did not agree with a number of things contained in Larned's written write-up. Frazier told Martinez that, as a result, she did not sign Larned's write-up and that the two went back and forth in their conversation until Larned told Frazier that she was terminated from Respondent. (Tr. 38–39.)

On Monday, May 13, Larned telephoned Frazier after 8 a.m. when she was not at work and according to Frazier said: "Hi darling, how are you, are you coming to work?" (Tr. 418–419.) Frazier responded: "What are you bipolar, you fired me on Friday." (Tr. 419.) Larned then responded that she did not fire Frazier on Friday and asked again if Frazier was coming into the office to work. Frazier responded that she was going to a doctor's appointment and repeated that Larned had already fired her on Friday. Id. Once again, Larned in response denied firing Frazier on May 10, but added that: "But now you're really fired because you did a 'no call no show' so now you're really fired." Id. Frazier concluded the call by saying ok, "I'm fired" and she hung up the telephone. Id. Larned admitted that she eventually characterized Frazier's conduct of not coming into work on May 13 as Frazier being a "no call no show." (Tr. 229.)

Larned testified that she called Frazier on May 13, a little after 8 a.m. and asked her where she was at and whether she was coming into the office. Frazier responded to Larned, "you fired me on Friday." Larned responded: "No Christine, I did not fire you on Friday" and asked whether she was coming in. Frazier responded: "No," (Tr. 219–222.) Larned further testified that 2 seconds later, Frazier texted her: "What I [Frazier] was doing with my [cell]phone on Friday was recording you [Larned] firing me[Frazier]." (Tr. 223.) Larned responded: "Okay." Id.

Once again there is conflicted testimony from Frazier and Larned as to who said what in their telephone conversation the morning of May 13. For the reasons set forth above, I credit Larned's version of what was said as being true and accurate over Frazier's version based on Frazier's history of exaggerating facts for her own benefit.[17]

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[16] Frazier lost her unemployment benefits case and appeal claiming that Larned, Tovar, and Stokes lied about the May 10, facts and because she was evicted from her residence, she did not receive the appeal package from the commission in a timely manner and did not attend the subsequent telephone appeal hearing. (Tr. 420–421.) Frazier, however, did not deny making any of the statements attributed to her in communications with the Texas Workforce Commission nor did she directly dispute statements attributed to Larned with the commission other than maintain that she was terminated on May 10. R. Exh. 7.

[17] As I indicate in this decision, there are other portions of Larned's testimony which I do not find to be credible. It is well recognized that it is not unusual for a judge to believe some, but not all, of the testimony of a witness.

The additional 2 sections were added to the May 10, 2013 disciplinary notice warning to Frazier on or after May 13, 2013, by Larned and Tovar thinks that she reviewed the entire warning with all 3 sections but Tovar could not recall the purpose of seeing it. (Tr. 208, 306–307; GC Exh. 11.) The middle section says that on May 10 Larned "demanded her [Frazier] to leave the office due to her behavior" because Larned believed that both she and Frazier needed to cool down as Larned admitted she was very upset at the time. (Tr. 208, GC Exh. 11.)

Sometime after Frazier's last day working at Respondent, Larned called Martinez into her office and Larned appeared to Martinez to boast about the fact that Frazier was gone from the office. (Tr. 48–49.) Larned further admitted to Martinez that she was glad that Frazier was gone from the office because Frazier was a cancer around the office and Martinez and Abeita's attitudes had started to change with their acquaintance with Frazier when she transferred to the South Office and this attitude change was beginning to negatively change the entire office according to Larned. (Tr. 48–49, 79.)

On May 17, Frazier had a Facebook conversation with a former employee at Respondent, Jill Wharam, and Frazier wrote: "Jennifer [Larned] fired me last Friday because I wouldn't clockout in between patients, then called on Monday and was like come to work I didn't fire you.. that bitch is bi-polar. I'm surprised I lasted this long .. I went and filed with unemployment that same day and you know what that bitch is trying to dispute it! …..Karazee!!!" (Tr. 423; GC Exh. 14.)

In July, Abeita contacted Frazier to inquire how things were going and in July Frazier communicated to Abeita through a text that she was doing fine and had gotten another job but he also understood the text to say that she had been fired by Respondent and that Frazier did not quit. (Tr. 118–119, 122–123, 422; GC Exh. 15.) The text from Frazier to Abeita specifically says: "… you know I [Frazier] had a telephone hearing yesterday with unemployment and Jen [Larned], Ashley [Stokes], and Valerie [Tovar] lied [under] oath [and] said I quit". (GC Exh. 15.)

Larned and Tovar issued Abeita a first step disciplinary warning in the summer 2013, for his untimely work assignments apparently connected with processing crowns, bridges, and other things needing to go to the lab with dentist signed lab slips. (Tr. 350–352.)

Also some time after May 10, Martinez texted Frazier to thank her for standing up for the South Office employees to Larned before Frazier left the South Office. (Tr. 39–40; GC Exh. 19.) Frazier responds to Martinez saying that she was tired of Larned and her bullshit. Id.

In August 2013, Frazier sent a Facebook text to Stephanie Castelo, a receptionist for Respondent at its North Office with Frazier writing in response as to whether she was still working at Respondent: "No Jennifer [Larned] fired me then lied and told corporate [Respondent] I quit." (Tr. 424–415; GC Exh. 16.)

Larned asked Respondent employees to be witnesses for Respondent in the Texas Workforce Commission proceedings before September 2013, and Tovar, Stokes, and Larned all testified against Frazier at the proceeding won by the Respondent as the commission determined that Frazier quit her job with Respondent rather than having been fired or terminated. (Tr. 321–325; R. Exh.7.)

Larned admitted that Martinez had given her notice in August 2013, that he had been contacted by the NLRB about an investigation they were conducting of Respondent in relation to a charge filed by Frazier. Martinez also told Larned that the NLRB was contacting Abeita too

and Martinez also told Larned that he did not want to get involved in the investigation. (Tr. 230–233.)

B. Analysis

In the matter before me, I find that the General Counsel has not made a prima facie showing that Frazier was terminated by Respondent on or about May 10, 2013. Thus I find that the General Counsel has failed to make a prima facie case of discharge. The amended complaint paragraphs 6(a)–(c), and paragraphs 7–9, allege that on about May 10, 2013, Respondent terminated Frazier because Frazier engaged in protected concerted activities regarding wages, hours and working conditions of Respondent's employees through Frazier's specific complaints and this conduct violates Section 8(a)(1) of the Act. There is no dispute that Frazier concertedly complained to management and others about Respondent's policy of requiring hygienists to clock-out between patients. Similarly, Frazier and other employees complained about needing more Cavitron tips and there is no doubt about management's animus to this complaint.

Here, as stated above, I find that the alleged adverse employment action, Frazier's purported May 10 employment termination by the Respondent, has not been proven by a preponderance of the evidence. I find that Larned told Frazier to "get out" of Respondent's South Office in the early afternoon of May 10, or Larned "would suspend her" as the personality conflict between Larned and Frazier had, once again, become elevated to a shouting match as Frazier proceeded to clock-out at the end of her workday. I further find that Frazier voluntarily decided not to show up for work at Respondent on May 13, 2013. The General Counsel bears the burden to prove that Frazier's termination occurred by preponderant evidence. As the only evidence to support this allegation is testimony riddled with credibility problems, I find this burden has not been met. Accordingly, I recommend dismissal of this complaint allegation.[18]

[18] I note that there was no motion to add as additional facts Respondent's issuance of the April 3 and May 10 written warnings to Frazier being unlawful under the Act and the newly amended complaint does not allege that any of these written warnings were issued unlawfully in response to Frazier's protected concerted activities and, accordingly, I will not make any findings that such unfair labor practices occurred by virtue of Respondent's adverse actions against Frazier. If these two alleged unlawful written warning facts were part of the amended complaint allegations, I would find them to be unlawful under a *Wright Line* analysis. See i.e., *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977). *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Thus, as the Board stated in *Naomi Knitting Plant,* 328 NLRB 1279, 1281 (1999), to sustain the initial burden of persuasion the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue which the expertise of the Board is peculiarly suited to determine. Once the General Counsel satisfies this initial showing which I would find here because I find that the Respondent was motivated to issue each of the written warnings by Frazier's protected concerted activities on April 3 and May 10. As a result, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Donaldson Bros. Ready Mix, Inc.,* 341 NLRB 958, 961 (2004). Here, the Respondent would be required to show that it actually would have issued Frazier a written warning around April 3, absent its belief that Frazier complained about the need to improve employees' work conditions by Respondent ordering more Cavitron tips and that it would have issued the May 10 written warning absent its belief that Frazier complained about clocking out terms and conditions of her employment. Because Respondent failed to prove this, I would find that each of the April 3 and May 10 written warnings were unlawful.

VIII. THE GENERAL COUNSEL'S MOTION TO AMEND COMPLAINT IS GRANTED BASED ON CLOSELY CONNECTED NEW EVIDENCE PRODUCED AT OR NEAR HEARING AND RESPONDENT'S FULL AND FAIR OPPORTUNITY TO LITIGATE THE NEW LEGAL THEORIES

Both at the start of hearing and at the end of the General Counsel's case-in-chief, the General Counsel moved to amend the complaint to add new paragraphs 6(d)-6(h) to include: (1) paragraph 6(d) - an alleged unlawful rule/policy with regard to employees being precluded from discussing salaries and wages contained in the Employee Handbook that was submitted approximately 1 week before hearing in response to a subpoena request (see Section III above). (Tr. 496–497; GC Exh. 12 at p.5.); (2) paragraph 6(e)—alleging that in about September 2013, specific date unknown, Respondent by Larned at Respondent's Austin, Texas facility interrogated its employees about their participation in Board activities and sympathies toward protected concerted activities of other employees; (3) paragraph 6(f)—alleging that in September 2013, specific date unknown, Respondent by Larned at Respondent's Austin, Texas facility threatened its employees with unspecified reprisals if they participated in the National Labor Relations Board proceedings; (4) paragraph 6(g)—alleging that in about March 2014, specific date unknown, Respondent by Larned at Respondent's Austin, Texas facility threatened its employees with unspecified reprisals if they engaged in protected concerted activities by testifying at Board proceedings; and (5) paragraph 6(h)—alleging that in about March 2014, specific date unknown, Respondent by Larned at Respondent's Austin, Texas facility interrogated its employees about their future testimony at Board proceedings. (Tr. 496–500.)

In support of amending the complaint, the General Counsel cites to *Johnnie's Poultry,* 146 NLRB 770, 775 (1964), holding that when the employee is approached and asked questions about his participation in a Board proceeding, whether it is in the investigation or coming to trial, that the employer's representative questioning the employee gives that employee certain assurances there will be no reprisals and that his cooperation with the employer's agent is voluntary; and there was no such thing given to the employee. The General Counsel argues here that this is why they had such a hard time getting participation in this case. They were concerned that they would be fired and so that should be addressed and so that's why the General Counsel seeks to amend the complaint to include that, at least for witness Martinez. (Tr. 84–85.)

I find that these amendments are closely connected to the subject matter of the complaint and they were not pursued by the Region any earlier because witnesses were fearful of participating in the General Counsel hearing because of Respondent's interrogations and threats without providing them any assurances that there would be no reprisals. See Board's Rules and Regulations, Section 102.17; NLRB Division of Judges Bench Book (August 2010), Section 3.320. I further find that the proposed amendments are just and they have been fully litigated. Also, I find that Respondent had a full and fair opportunity to respond to all these amendments through cross-examination of the General Counsel's witnesses and by presenting its own witnesses and relevant evidence in defense of the newly added charges. *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); see also *Sheet Metal Workers Local 91*, 294 NLRB 766 (1989); *Payless Drug Stores*, 313 NLRB 1220 (1994); *Redd-I Incorporated*, 290 NLRB 1115 (1988); and *Old Dominion Freight Line*, 331 NLRB251, 251–252 (2000).

IX. ALLEGED INTERROGATION: RESPONDENT'S ACTIONS THROUGH LARNED REGARDING BOARD INVESTIGATIONS

A. 2013 Interrogations

1. Facts

Larned admitted that Martinez had given her notice in August 2013, that he had been contacted by the NLRB about an investigation they were conducting of Respondent in relation to a charge filed by Frazier. Martinez also told Larned that the NLRB was contacting Abeita too and Martinez also told Larned that he did not want to get involved in the investigation. (Tr. 230–233.)

Martinez' more credible testimony was that after Frazier filed her charge with the Board in August, Larned frequently contacted Respondent's employees to inquire if the Board had contacted them for their statements about Frazier's charge or what they would say if the Board investigator asked them questions about the Charging Party. This occurred from 8 to 10 times to Martinez. At no time when Larned approached Martinez with her inquiries about potential disclosures to the Board did she tell him that any discussions with her about this subject were voluntary or that there would be no reprisals to any employee speaking to the Board.

Abeita submitted his sworn affidavit to the General Counsel of the National Labor Relations Board (the Board) in September 2013, concerning facts known to him in this case. Soon thereafter, Larned asked Abeita whether or not he had given a statement to the Board. He responded that he did give the Board a statement. Larned then started to ask Abeita what he said to the NLRB but before he responded she backtracked and told him that she did not want to know what he said. (Tr. 236, 238.)

About the same time that Martinez first knew that a Board representative was trying to get in touch with him and later when the Board representative went to the South Office and spoke to Respondent's employees, Larned asked Martinez if the Board had contacted him, if he was going to talk to the Board, and Larned asked Martinez not to speak to any Board representative. (Tr. 43.)

At some point in time from August–February 2013, Martinez provided his affidavit to the Board in connection with this proceeding. Larned asked Martinez to meet with her in her office and again asked Martinez if he had given his affidavit and not to speak to the Board. Martinez denied to Larned giving his affidavit to the Board and told her he did not want to get involved in this proceeding because he did not want Larned to harass him or give him a hard time at work that he explained as assigning him extra chores, duties, or adding extra responsibilities to his regular workday duties. (Tr. 43–44.)

Sometime after the NLRB investigation in September but before the March 2014 hearing, Abeita approached Larned again to tell her exactly what he had said to the NLRB in his affidavit. Larned, the second highest ranking member of Respondent's management at the South Office, told him that she would not discuss this with him without having a witness present. Tovar was contacted by Larned and Abeita, Larned, and Tovar met in Larned's office at Respondent. Larned did not tell Abeita that he was there voluntarily. She also did not tell Abeita that there would be no reprisals against him for anything he might have told the NLRB. (Tr. 239–241.)

2. Analysis

Amended complaint paragraphs 6(e) and 7 allege that the Respondent interrogated employees in September 2013, when Respondent by Larned at Respondent's Austin, Texas facility interrogated its employees about their participation in Board activities and sympathies toward protected concerted activities of other employees in violation of Section 8(a)(1) of the Act. Under Section 8(a)(1), it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Rights guaranteed by Section 7 include the right to engage in union activities and "concerted activities for the purpose . . . of mutual aid or protection."

In *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), enfd. sub nom. *Hotel Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985), the Board ruled that the appropriate means to decide whether the questioning of an employee amounted to unlawful interrogation was to consider the totality of the circumstances of each situation. As guiding principles for the analysis, the Board suggested—though did not mandate—the application of the factors used in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). *Rossmore House* at 1178 fn. 20. These factors include (1) the background of the employer, (2) the nature of the information sought, (3) the identity of the questioner, (4) the place and method of interrogation, and (5) the truthfulness of the reply. *Bourne* at 48. While these factors provide insightful assistance, they "are not to be mechanically applied in each case." Instead, the Board has found that the task is ultimately "to determine whether, under all the circumstances, the interrogation reasonably tended to restrain or interfere with the questioned employee's exercise of Section 7 rights. The *Rossmore House* test is an objective one and does not rely on the subjective aspect of whether the employee was in fact intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001).

Furthermore, the purposes which the Board and courts have held legitimate privilege is the investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial of the case. In allowing an employer the privilege of ascertaining the necessary facts from employees in these given circumstances, however, the Board and courts have established specific safeguards designed to minimize the coercive impact of such employer interrogation. Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege. *Johnnie's Poultry Co*., 146 NLRB 770, 775–776 (1964), *enfcmt. denied on other grounds*, 344 F.2d 617 (8th Cir. 1965).

In this case, Larned admitted that Martinez had given her notice in August 2013, that he had been contacted by the NLRB about an investigation they were conducting of Respondent in relation to a charge filed by Frazier. Martinez also told Larned that the NLRB was contacting Abeita too and Martinez also told Larned that he did not want to get involved in the investigation. (Tr. 230–233.) Martinez' convincing testimony was that after Frazier filed her

charge with the Board in August, Larned frequently contacted Respondent's employees to inquire if the Board had contacted them for their statements about Frazier's charge or what they would say if the Board investigator asked them questions about the Charging Party. This occurred from 8 to 10 times to Martinez. At no time when Larned approached Martinez with her inquiries about potential disclosures to the Board did she tell him that any discussions with her about this subject were voluntary or that there would be no reprisals to any employee speaking to the Board.

About the same time that Martinez first knew that a Board representative was trying to get in touch with him and later when the Board representative went to the South Office and spoke to Respondent's employees, Larned asked Martinez again if the Board had contacted him, if he was going to talk to the Board, and Larned asked Martinez not to speak to any Board representative. (Tr. 43.)

At some point in time from September to February 2013, Martinez provided his affidavit to the Board in connection with this proceeding. Larned asked Martinez to meet with her in her office and again asked Martinez if he had given his affidavit and not to speak to the Board. Martinez denied to Larned giving his affidavit to the Board and told her he did not want to get involved in this proceeding. (Tr. 43–44.)

Sometime after the NLRB investigation in September but before the March 2014 hearing, Abeita approached Larned again to tell her exactly what he had said to the NLRB in his affidavit. Larned, the second highest ranking member of Respondent's management at the South Office, told him that she would not discuss this with him without having a witness present. Tovar, Respondent's assistant manager, was contacted by Larned and Abeita, Larned, and Tovar met in Larned's office at Respondent. Larned did not tell Abeita that he was there voluntarily. She also did not tell Abeita that there would be no reprisals against him for anything he might have told the NLRB. (Tr. 239–241.)

Upon considering the totality of the circumstances, including the *Bourne* factors, I conclude that Respondent, through its District Manager Supervisor Larned, unlawfully interrogated Martinez and Abeita in violation of Section 8(a)(1) of the Act. The evidence shows that at the time of the conversations in September 2013, Respondent had been charged by Frazier with an unfair labor practice and the Board was investigating the charge. As a result, the Respondent was attempting to gather information from its employees about the case. Larned frequently contacted Respondent's employees to inquire if the Board had contacted them for their statements about Frazier's charge and what they would say if the Board investigator asked them questions about the Charging Party. This occurred from 8 to 10 times to Martinez. At no time when Larned approached Martinez with her inquiries about potential disclosures to the Board did she tell him that any discussions with her about this subject were voluntary or that there would be no reprisals to any employee speaking to the Board. Larned, moreover, offered no justification for her questioning or assurances against reprisal. See *Norton Audubon Hospital*, 338 NLRB 320, 321 fn. 6 (2002); *Johnnie's Poultry Co*., supra at 775–776 (Privilege to seek information from employees to defend case comes with specific safeguards.). As a result, I find that Respondent violated Section 8(a)(1) when it unlawfully interrogated Martinez in September 2013, when Larned asked him questions about information he might have provided to the Board without providing Martinez with the safeguards required to avoid coercive interrogation.

Similarly, when Larned and Tovar met in Larned's office to discuss what Abeita had said in his affidavit to the Board, neither manager told Abeita that the closed-door meeting was voluntary or that there would be no reprisals against Abeita for anything he told Larned in the meeting or to the Board in his affidavit. More importantly, as stated above, asking an employee about their statement or affidavit to the Board is beyond the legitimate privilege and is a per se violation of the Act and Section 8(a)(1) under these circumstances. See *Johnnie's Poultry Co*., supra at 775–776 (By interrogating employees concerning statements or affidavits given to a Board agent, Respondent engaged in interference, restraint, and coercion in violation of Section 8(a) (1) of the Act.).

B. Alleged Interrogation: March 2014

1. Facts

The amended complaint paragraph 6(h) alleges that in March 2014, Respondent by Larned at Respondent's Austin, Texas facility unlawfully interrogated its employees about their future testimony at Board proceedings in violation of Section 8(a)(1) of the Act.

Larned approached Martinez again on March 17, 2014, when various other Respondent employees received subpoenas from the General Counsel to appear at hearing. Martinez assumed that Larned thought that he too had received a subpoena to trial in this case though he never admitted to providing the Board an affidavit beforehand and he denied to Larned that he was involved in the Board's investigation or upcoming trial in this matter. At that time, Martinez had not received any subpoena.

Larned responded to Martinez telling him that she believed that he had something to do with this proceeding as she added that everyone at Respondent "was acting funny" and that she thought that Martinez would show up for the trial as a witness. (Tr. 45.) Larned admitted asking Martinez if he had been subpoenaed and whether he planned to testify and she says Martinez asked her whether she had anything to hide. (Tr. 234.) Larned responded that "we [Respondent and its employees] have nothing to hide" and mentioned to Martinez that she was a little confused why he would only give a week's notice before leaving Respondent. Id. Martinez explained that he continued his low profile with Larned and did not openly disclose or show her that he had been subpoenaed to trial by the General Counsel. Martinez also told Larned on March 17, that he thought the whole thing about talking with Larned behind closed doors or anyone else is called snitching at work. He further commented to Larned that he was not going to snitch. Larned's response to this was that he should not testify at hearing and also said: "[G]ood, because snitches get stitches." (Tr. 45.)

2. Analysis

For the same reasons referenced above in connection with Respondent's unlawful interrogation of Martinez in September 2013, I find that Respondent through Larned again unlawfully interrogated Martinez in March 2014, when she asked him whether he had been subpoenaed to attend the trial in this case and instructed Martinez not to testify because "snitches get stitches." Not only did Larned interrogate Martinez without the requisite *Johnnie's Poultry* safeguards but Larned's statements to Martinez were particularly coercive as she told him not to testify at trial and suggested that if he did testify, bad things would happen to him. As a result, I further find that in March 2014, Respondent by Larned at Respondent's Austin, Texas facility

unlawfully interrogated its employees about their future testimony at Board proceedings in violation of Section 8(a)(1) of the Act.

X. ALLEGED THREAT: RESPONDENT'S ACTIONS THROUGH LARNED

A. 2013 Threat

1. Facts

The amended complaint paragraphs 6(f) and 7 allege that about September 2013, Respondent, by Larned, at Respondent's Austin, Texas facility, threatened its employees with unspecified reprisals if they participated in the National Labor Relations Board proceedings.

At some point in time from September 2013–February 2014, Martinez provided his affidavit to the Board in connection with this proceeding. Larned asked Martinez to meet with her in her office and again asked Martinez if he had given his affidavit and not to speak to the Board. Martinez denied to Larned giving his affidavit to the Board and told her he did not want to get involved in this proceeding. (Tr. 43–44.)

2. Analysis

I credit Martinez's testimony over that of Larned. Martinez's testimony was specific and detailed and his demeanor reflected certainty with respect to this conversation. In addition, his testimony is consistent with Abeita's testimony that Larned also approached him about any contact or cooperation he had with the Board investigation. I find Martinez's testimony to be more reliable than Larned's somewhat perfunctory denials.

To assess whether an interrogation is coercive, the Board considers such factors as whether proper assurances were given during the questioning, the background and timing of the interrogation, the nature of the information sought, the identity the questioner, the place and method of the interrogation, and the truthfulness of the reply. *Metro One Loss Prevention Services*, 356 NLRB No. 20 (2010); *Stabilus, Inc.,* 355 NLRB 836, 850 (2010). In this case, employee Martinez testified that Respondent's district manager and supervisor, Larned, questioned him and other employees about being contacted by the Board as part of its investigation of Charging Parties' complaint. The questioning was by one of Respondent's highest officials, the one who issued adverse actions against employees, without proper assurances and sought to discover the employee's anticipated involvement with the Board investigation. I find that under all the circumstances the questioning at issue would reasonably tend to coerce the Martinez so that he would be restrained from exercising rights protected by Section 7 of the Act." See *Medcare Associates, Inc.*, 330 NLRB 935, 940 (2000). In addition, Martinez convincingly testified that he was worried about being assigned harder tasks such as cleaning toilets and being harassed at work by Respondent if he provided information to the Board and cooperated with their investigation. Under these circumstances, I find that Larned's questions to Martinez unlawfully threatened him and violated Section 8(a)(1) of the Act.

B. 2014 Threat

1. Facts

The amended complaint paragraphs 6(g) and 7 allege that about March 2014, Respondent by Larned and Respondent's Austin, Texas facility threatened its employees with unspecified reprisals if they engaged in protected concerted activities by testifying at Board proceedings.

Martinez explained that he continued his low profile with Larned and did not openly disclose or show her that he had been subpoenaed to trial by the General Counsel. Martinez also told Larned on March 17, that he thought the whole thing about talking with Larned behind closed doors or anyone else is called snitching at work. He further commented to Larned that he was not going to snitch. Larned's response to this was: "[G]ood, because snitches get stitches." (Tr. 45.)

2. Analysis

The Board has found that "be careful" warnings to an employee convey the threatening message that union activities would place an employee in jeopardy. *Gaetano & Associates Inc.,* 344 NLRB 531, 534 (2005) (finding that telling an employee to "be careful" was an unlawful threat). *See also*, e.g., *St. Francis Medical Center*, 340 NLRB 1370, 1383–1384 (2003) ("be careful" statement by supervisor in context of union activity held unlawful); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995) (supervisor's statements such as "watch out" are unlawful implied threats).

Further, the Board in *Hall Construction,* 297 NLRB 816, 818 (1990), adopted a finding of an unlawful threat of blacklisting where employees were told that unionizing would mean "all of us guys would be blackballed from any work in the [the respective employers' field]" *Flamingo Hilton-Laughlin*, 324 NLRB 72, 116 (1997). Here, District Manager and Respondent Agent Larned gave Martinez a warning that if he testified at the unfair labor practice hearing in this case or "snitched," he would receive something bad from Respondent or a threat of "stitches" which could have included termination of his employment before his last day or a bad future job reference. Larned stated that testifying at trail could lead to "stitches" and she advised Martinez not to testify at hearing. These statements are unlawful for the same reasons that the "be careful" warnings were unlawful in *Gaetano & Associates.* As a result, I further find that these threats made by Respondent violated Section 8(a)(1) of the Act.

I credit Martinez' testimony over that of Larned for the March 2014 conversation above. Martinez' testimony was specific and detailed and his demeanor reflected certainty with respect to this conversation. I find Martinez' testimony to be more reliable than Larned's somewhat perfunctory denials. Accordingly, I find that on or about March 17, 2014, the Respondent, through Larned, unlawfully threatened Martinez in violation of Section 8(a)(1) by saying to him: "[G]ood, because snitches get stitches." (Tr. 45.) As noted above, Martinez believed that this response from Larned meant that if he testified to the Board at trial, something bad would happen to him. I find that Larned's statement to Martinez is sufficient to constitute a threat of discharge or a negative job reference for testifying at a Board hearing and, accordingly, I find that Respondent has violated Section 8(a)(1) of the Act by illegally threatening Martinez while he was still employed at Respondent with an unspecified reprisal.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent engaged in conduct in violation of Section 8(a)(1) of the Act:

(a) By maintaining in its Employee Handbook provisions that preclude employees from discussing their salaries and wages.

(b) By interrogating employees in September 2013, at the Respondent's facilities, for cooperating with Board investigations.

(c) By interrogating employees in March 2014, for preparing to testify at a Board proceeding.

(d) By threatening employees in September 2013, at the Respondent's facilities, for cooperating with Board investigations.

(e) By threatening employees in March 2014, at the Respondent's facilities , for preparing to testify at a Board proceeding.

3. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The above violations are unfair labor practices within the meaning of the Act.

5. The Respondent did not also violate the Act as further alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist from engaging in such conduct in the future and to take certain affirmative action designed to effectuate the policies of the Act. To remedy the Respondent's violations of Section 8(a)(1) of the Act, I shall recommend that the Respondent post and abide by the attached notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[19]

ORDER

The Respondent, Austin Professional Dental Corporation, P.C., Austin and Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Maintaining in its Employee Handbook rules that preclude employees from discussing their salaries and wages.

(b) Interrogating employees for cooperating with Board investigations at the Respondent's facilities.

(c) Interrogating employees for preparing to testify at a Board proceeding.

(d) Threatening employees to prevent them from assisting in a Board investigation.

(e) Threatening employees to prevent them from testifying at a Board hearing.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, to the extent it has not already done so, rescind any rules in its Employee Handbook that preclude employees from discussing their salaries and wages and notify its employees in writing that it has done so.

(b) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix A at its Austin and Dallas, Texas facilities.[20] Copies of the notices, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities where posting is required, the Respondent shall duplicate and mail, at its own expense, a copy of the notices to all current employees and former employees employed at those facilities at any time since May 10, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 26, 2015

Gerald E. Etchingham
Administrative Law Judge

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain in our Employee Handbook rules that preclude employees from discussing their salaries and wages.

WE WILL NOT discourage you from talking to each other about salaries and wages.

WE WILL NOT interrogate employees for cooperating with Board investigations at the Respondent's facilities.

WE WILL NOT interrogate employees for preparing to testify at a Board proceeding.

WE WILL NOT threaten employees to prevent them from assisting in a Board investigation.

WE WILL NOT threaten employees to prevent them from testifying at a Board hearing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind any rules in our Employee Handbook that precludes employees from discussing their salaries and wages and notify employees in writing that we have done so.

AUSTIN PROFESSIONAL DENTAL CORPORATION, P.C.

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor St., Room 8A24, Federal Office Building, Fort Worth, Texas 76102
(817) 978-2930, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-111300 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2930.